



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2022-0332; FRL 9902-01-OAR]

California State Motor Vehicle Pollution Control Standards and Nonroad Engine Pollution Control Standards; The “Omnibus” Low NO_x Regulation; Request for Waivers of Preemption; Opportunity for Public Hearing and Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of opportunity for public hearing and comment.

SUMMARY: The California Air Resources Board (CARB) has notified the Environmental Protection Agency (EPA) that it has finalized its “Omnibus” Low NO_x Regulation, which establishes criteria pollutant exhaust emission standards for new 2024 and subsequent model year on-road medium- and heavy-duty engines and vehicles. The regulation also establishes emissions-related requirements for off-road engines. By letter dated January 31, 2022, CARB submitted a request that EPA grant a waiver of preemption and an authorization under the Clean Air Act (CAA) for this regulation. This notice announces that EPA has scheduled a public hearing concerning California’s request and that EPA is accepting written comment on the request.

DATES: Written comments must be received on or before August 2, 2022.

Public Hearing: EPA plans to hold a virtual public hearing on June 29, 2022. This one hearing will also cover the notices for California’s Advanced Clean Truck Regulation, Docket No. EPA-HQ-OAR-2022-0331, and 2018 HD Warranty Amendments, Docket No. EPA-HQ-OAR-2022-0330. Additional information regarding the virtual public hearing and this action can be found at: <https://www.epa.gov/regulations-emissions-vehicles-and-engines/public-hearing-information-waiver-requests-californias>.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2022-

0332, by one of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov> (our preferred method).

Follow the on-line instructions for submitting comments.

- *Mail*: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave., NW, Room B108, Mail Code 6102T, Washington, D.C. 20460, Attention Docket ID No. EPA-HQ-OAR-2022-0332. Please include a total of two copies.

- *Hand Delivery*: EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, D.C. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Instructions: Direct your comments to Docket ID No EPA-HQ-OAR-2022-0332.

Instructions: All submissions received must include the Docket ID No. for this action. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. For the full EPA public comment policy, information about Confidential Business Information (CBI) or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special

characters, any form of encryption, and be free of any defects or viruses. Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy.

EPA has established a docket for this action under EPA-HQ-OAR-2022-0332. Publicly available docket materials are available either electronically at <https://www.regulations.gov> or in hard copy at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave. NW, Washington, D.C. Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only, and walk-ins are not allowed. Visitors to the Reading Room must complete docket material requests in advance and then make an appointment to retrieve the material. Please contact the EPA Reading Room staff at (202) 566-1744 or via email at docket-customerservice@epa.gov to arrange material requests and appointments. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and status, please visit us online at <https://www.epa.gov/dockets>.

EPA's Office of Transportation and Air Quality also maintains a web page that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver and authorization Federal Register notices. The page can be accessed at <https://www.epa.gov/state-and-localtransportation/vehicle-emissionscalifornia-waivers-and-authorizations>. Please note that due to differences between the software used to develop the documents and the software into which the documents may be downloaded, changes in format, page length, etc., may occur.

Public Hearing. The virtual public hearing will be held on June 29, 2022. The hearing will begin at 9:00 a.m. Eastern Time (ET) and end when all parties who wish to speak have had an opportunity to do so. As noted above, this hearing will also cover the notices for California's

Advanced Clean Truck Regulation, Docket No. EPA-HQ-OAR-2022-0331, and 2018 HD Warranty Amendments, Docket No. EPA-HQ-OAR-2022-0330. All hearing attendees (including those who do not intend to provide testimony and merely listen) should register at:

https://usepa.zoomgov.com/webinar/register/WN_ByheDTzYSPuoGbv8J7yNwg by June 21, 2022. Please refer to *Instructions* in the **ADDRESSES** section and *Procedures for Public Participation* in the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing and public comment process.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Transportation and Climate Division (6405J), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave, NW, Washington, D.C. 20460, Email: Dickinson.David@epa.gov or Kayla Steinberg, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, D.C. 20460, Email: Steinberg.Kayla@epa.gov.

SUPPLEMENTARY INFORMATION:

I. CARB's New Waiver and Authorization Requests

CARB's January 31, 2022, letter to the Administrator notified EPA that CARB had adopted its "Omnibus" Low NO_x Regulation.¹ The "Omnibus" Low NO_x regulation, adopted by the Board on August 27, 2020, establishes the next generation of criteria pollutant (specifically, nitrous oxide (NO_x) and particulate matter (PM)) exhaust emission standards and other emission-related requirements for new 2024 and subsequent model year on-road medium- and heavy-duty engines and vehicles. In addition to these on-road requirements, the Omnibus Low NO_x Regulation incorporates the PM emission standard established in the federal Phase 2 GHG Regulation into both California's Heavy-Duty Diesel Engine Idling Regulation and the associated California off-road diesel test procedures for diesel-fueled auxiliary power units

¹ The Omnibus regulation is comprised of new title 13, California Code of Regulations (Cal. Code Regs.) sections 2139.5, and 2169.1 through 2169.8; amendments to title 13, Cal. Code Regs., sections 1900, 1956.8, 1961.2, 1965, 1968.2, 1971.1, 1971.5, 2035, 2036, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2121, 2123, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2133, 2137, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2166, 2166.1, 2167, 2168, 2169, 2170, 2423, and 2485; and amendments to title 17 Cal. Code Regs. sections 95662 and 95663.

(APUs).² CARB requests that EPA grant a new waiver for the on-road medium- and heavy-duty engines and vehicles standards and an authorization for the off-road regulation. CARB's request and waiver analysis includes "a description of California's rulemaking action, a review of the criteria governing EPA's evaluation of California's request for waiver and authorization action, [CARB's] analysis and rationale supporting [its] request, and supporting documents."³ CARB's waiver and authorization analysis, set forth in the Waiver Request Support Document, addresses how the on-road regulations within the Omnibus Low NO_x regulation contained in the waiver request meets each of the three waiver criteria in section 209(b)(1) and addresses how the off-road regulations contained in the request meets each of the three authorization criteria in section 209(e)((2)(A) of the CAA.⁴ For example, CARB explains how its regulations will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards and that no basis exists for the Administrator of EPA to find that CARB's determination is arbitrary and capricious under section 209(b)(1)(A) of the CAA.⁵ CARB also explains how it continues to demonstrate California's need for a separate motor vehicle emission program, under section 209(b)(1)(B) of the CAA.⁶ Finally, CARB explains how the regulations in its waiver request meet the requirement in section 209(b)(1)(C), which requires California's regulations to be consistent with section 202(a) of the CAA.⁷

II. Scope of Preemption and Criteria for a Waiver under the Clean Air Act

Section 209(a) of the Clean Air Act, as amended ("Act"), 42 U.S.C. 7543(a), provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification,

² Letter from Richard W. Corey, CARB, dated December 31, 2022, at p. 1, available at Docket No. EPA-HQ-OAR-2022-0332. The Waiver Request Support Document, attached to the letter from Mr. Corey, is available to Docket No. EPA-HQ-OAR-2022-0332.

³ Letter from Richard W. Corey, CARB, dated December 31, 2022, at p. 1.

⁴ The Waiver Request Support Document provides a summary of the adopted regulation, a brief history of similar regulations, and an analysis of the adopted regulation under the waiver criteria in section 209(b)(1) of the CAA.

⁵ Waiver Request Support Document at 46–50. Similarly, for CARB's off-road regulation at 73.

⁶ Waiver Request Support Document at 50–52. Similarly, for CARB's off-road regulation at 74–75.

⁷ Waiver Request Support Document at 52–72. Similarly, for CARB's off-road regulation at 75–77.

inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(b) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that the state standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. California is the only state that is qualified to seek and receive a waiver under section 209(b).⁸ Section 209(b)(1) requires the Administrator to grant a waiver unless he finds that (A) the determination of the state is arbitrary and capricious, (B) the state does not need the state standards to meet compelling and extraordinary conditions, or (C) the state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. Previous decisions granting waivers of Federal preemption for motor vehicles have stated that State standards are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period or if the Federal and State test procedures impose inconsistent certification procedures.⁹

Section 209(e)(1) of the CAA, 42 U.S.C. 7543(e)(1), prohibits states and local governments from adopting or attempting to enforce any standard or requirement relating to the control of emissions from new nonroad vehicles or engines. The CAA also preempts states from adopting and enforcing standards and other requirements related to the control of emissions from

⁸ “The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.” *Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1121 (D.C. Cir. 1979).

⁹ To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the state and the Federal requirements with the same test vehicle in the course of the same test. *See, e.g.*, 43 FR 32182 (July 25, 1978).

non-new nonroad engines or vehicles. Section 209(e)(2)(A) requires the Administrator, after notice and opportunity for public hearing, to authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such nonroad vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. Section 209(e)(2)(A) requires the Administrator to grant an authorization of California's requirements unless he finds that (1) the determination of California is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with this section.

On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2)(A), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. EPA revised these regulations in 1997.¹⁰ As stated in the preamble to the 1994 rule, EPA has historically interpreted the section 209(e)(2)(A)(iii) "consistency" inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers). In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests.

III. Request for Comment

¹⁰ 59 FR 36969 (July 20, 1994). These regulations were subsequently slightly modified and moved to 40 CFR Part 1074. *See* 73 FR 59379 (Oct. 8, 2008).

When EPA receives new waiver or authorization requests from CARB, EPA traditionally publishes a notice of opportunity for public hearing and comment and then, after the comment period has closed, publishes a notice of its decision in the *Federal Register*. Regarding California's request for a waiver under section 209(b), for its motor vehicle emission standards, EPA invites comment on the following three criteria: whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

With regard to section 209(b)(1)(B), EPA must grant a waiver request unless the Agency finds that California "does not need such State standards to meet compelling and extraordinary conditions." EPA has interpreted the phrase "need[s] such State standards to meet compelling and extraordinary conditions" to mean that California needs a separate motor vehicle program as a whole in order to address environmental problems caused by conditions specific to California and/or effects unique to California (the "traditional" interpretation).¹¹ EPA intends to use this traditional interpretation in evaluating California's Omnibus Low NOx Regulations. EPA seeks comment on whether California needs the Omnibus Low NOx Regulations under section 209(b)(1)(B).

With regard to section 209(b)(1)(C), EPA must grant a waiver request unless the Agency finds that California's standards are not consistent with section 202(a). EPA has previously stated that consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration to costs, and that

¹¹ See, e.g., 81 FR 78149, 78153 (November 7, 2016); 81 FR 95982 95985-95986 (December 29, 2016). EPA recently found and confirmed, in the Agency's reconsideration of a previous withdrawal of a waiver of preemption for CARB's Advanced Clean Car program, that the traditional interpretation of section 209(b)(1)(B) was appropriate and continues to be a better interpretation (87 FR 14332, 14367 (March 14, 2022)). CARB's January 31, 2022, waiver request addresses both the traditional and an alternative interpretation wherein the need for the specific standards in the waiver request would be evaluated.

California and applicable Federal test procedures be consistent.¹² Included in, but not limited to, EPA's request for comment is what provisions in section 202(a) of the CAA are applicable to California due to the reference of section 202(a) in section 209(b)(1)(C).¹³ EPA invites comment on how such provisions, to the extent they may be applicable to California, should be evaluated in the context of EPA's evaluation of CARB's waiver request under the criteria in section 209(b)(1)(C) of the CAA.

Regarding California's request for authorization under section 209(e), for its incorporation of the federal Phase 2 GHG Regulation PM standard for diesel-fueled APUs into California's Heavy-Duty Diesel Engine Idling Regulation and off-road test procedures, we request comment on: (a) Whether CARB's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (b) whether California needs such standards to meet compelling and extraordinary conditions; and (c) whether California's standards and accompanying enforcement procedures are consistent with section 209 of the Act.

IV. Procedures for Public Participation

EPA will begin pre-registering speakers for the hearing upon publication of this document in the Federal Register. To register to speak at the virtual hearing, please visit: https://usepa.zoomgov.com/webinar/register/WN_ByheDTzYSPuoGbv8J7yNwg. The last day to pre-register to speak at the hearing will be June 21, 2022. If you require the services of a

¹² See, e.g., 81 FR 78149, 78153-78154 ("EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility would be shown here by demonstrating that there is inadequate lead time to permit the development of technology necessary to meet the 2013 HD OBD New or Stricter Requirements that are subject to the waiver request, giving appropriate consideration to the cost of compliance within that time." (citing 38 FR 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975)); 81 FR 95982, 95986 (December 29, 2016); 70 FR 50322 (August 26, 2005).

¹³ For example, section 202(a)(3)(C) of the CAA provides: "(C) Lead time and stability.—Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated." See also 59 FR 48625 (September 22, 1994) and associated Decision Document at EPA-HQ-OAR-2022-0332; EPA's Notice of denial – Petition for Reconsideration of Waiver of Federal Preemption for California to Enforce Its NO_x Emission Standards and Test Procedures, 46 FR 22032 (April 15, 1981).

translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by June 14, 2022. EPA may not be able to arrange accommodations without advance notice.

Each commenter will have 5 minutes to provide oral testimony. EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. EPA recommends submitting the text of your oral comments as written comments to the rulemaking docket. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

The Agency will make a verbatim record of the proceedings at the hearing and will be placed in the docket. EPA will keep the record open until August 2, 2022. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record of the public hearing, relevant written submissions, and other information that she deems pertinent.

Persons with written comments containing proprietary information must distinguish such information from other comments to the greatest possible extent and label it as "Confidential Business Information" (CBI). If a person making comments wants EPA to base its decision in part on a submission labeled CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted for the public docket. To ensure that proprietary information is not inadvertently placed in the docket, submissions containing such information should be sent directly to the contact person listed above and not to the public

docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed and by the procedures set forth in 40 CFR Part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

Sarah Dunham,
Director,
Office of Transportation and Air Quality,
Office of Air and Radiation.

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